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THE HON. JOHN C. COUGHENOUR

8 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON, SEATTLE  
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10 **JAMES S. GORDON, Jr., a married**  
**individual; OMNI INNOVATIONS,**  
11 **LLC., a Washington limited**  
**liability company;**

12 **Plaintiffs,**

13 **v.**

14 **VIRTUMUNDO, INC, a Delaware**  
**corporation, d/b/a**  
15 **ADNOWLEDGEMAIL.COM;**  
16 **ADKNOWLEDGE, INC., a Delaware**  
**corporation, d/b/a**  
17 **ADKNOWLEDGEMAIL.COM;**  
18 **SCOTT LYNN, an individual; and**  
**JOHN DOES, I-X,**

19 **Defendants.**  
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**NO. CV06-0204JCC**

**PLAINTIFF'S RESPONSE IN**  
**OPPOSITION TO DEFENDANTS'**  
**MOTION TO COMPEL DISCOVERY**  
**RE LYNN INTERROGATORIES**

**[Hearing Noted Without Oral**  
**Argument for January 5, 2007]**

21 Plaintiffs James S. Gordon, Jr., and Omni Innovations, LLC by and through their  
22 undersigned attorney of record, respond to Defendants' Motion Compel Discovery as  
23 follows:  
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PLAINTIFF'S RESPONSE IN OPPOSITION TO  
DEFENDANTS' MOTION TO COMPEL DISCOVERY  
RE LYNN INTERROGATORIES -1  
GORDON v. VIRTUMUNDO, INC., ET AL

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Defendants once again complain in this Motion about the voluminous production of emails that they sent to Plaintiffs, and which Plaintiffs have attempted to sort, organize and in turn produce back to Defendants. Plaintiffs expect that such irony will not escape the Court.

**1. Defendants' Request For "Explanation" Of Plaintiffs' Theories RE False And/Or Misleading Information In Their Email Headers.**

**a. Defendants Have Been Provided With Information And Tools To Understand Plaintiffs' Claims.** Contrary to Defendants contention that Plaintiffs have failed to adequately explain their theories of how Defendants' emails violate the statutes, included as part of their First Supplemental Responses, in addition to the updated business records (emails) explained in more detail in the Declaration of James S. Gordon, Jr. submitted in response to Defendants' Motion To Compel Segregation Of Emails, Plaintiffs provided the following:

- A Table of Contents for the DVD;
- A Legend entitled "Normal or Valid 'Transport Path' Protocol (Visualware);
- A 267 page analysis of some 2,000 emails entitled "Email Analysis – Virtumundo" using the Visualware program, which traces emails and inserts coded indications of irregularities, and including highlighted allegedly deceptive/misleading subject lines.

See the Gordon Declaration submitted herewith attaching the Table of Contents, the Legend, and a 5 page representative sample of the Email Analysis.

**b. Defendants Have Now Received A Detailed Explanation Of The "From" Line Theory Explained In Plaintiffs' Motion For Partial Summary Judgment.** One of Defendants' principal complaints in their Motion is that Plaintiffs have failed to adequately articulate their theories about "how" Defendants' emails violate the subject statutes. Plaintiffs' claims allege statutory violations and as such largely involve issues of law. This is amply evidenced by Plaintiffs' recent filing of a

1 Motion For Partial Summary Judgment involving a majority of Defendants' emails at  
 2 issue in this lawsuit (Noted for hearing on January 12, 2007). Plaintiffs' Motion sets  
 3 forth in detail how at least 7,890 of Defendant Virtumundo's emails violate both the  
 4 Federal Can-Spam Act (15 USC 7701 et seq.) and the Washington CEMA (RCW  
 5 19.190 et seq.), the "statutes". Plaintiffs' Motion explains how the information in the  
 6 email headers of the referenced emails are materially false because they fail to  
 7 accurately identify the actual sender of the email. In an effort to evade detection, rather  
 8 than accurately identifying the name of the actual sender in the "From" line of the  
 9 header, Defendant instead chose to place generic ad copy in the "From" name field.  
 10 Plaintiffs explain in detail how such intentionally deceptive conduct clearly violates the  
 11 statutes by impairing the ability of the recipient of the email to easily and accurately  
 12 identify the actual sender, and obscuring the point of origin, something that both  
 13 Congress and the Washington legislature intended and required in enacting the  
 14 respective statutes.

15 This deceptive "From" line theory is but one way in which Defendants have  
 16 sought to intentionally deceive and mislead recipients of their emails in violation of the  
 17 statutes.

18 **c. False, Deceptive And/Or Misleading Subject Lines.**

19 The highlighted emails in the "Analysis" referenced above in section sub. (a) are  
 20 merely representative and are by no means exhaustive. Plaintiffs continue to analyze  
 21 and identify those particular elements of Defendants' email headers that violate the  
 22 statutes, and will provide further analyses as those are completed by way of further  
 23 supplementation of their discovery responses. Defendants ostensibly seek to compel  
 24 Plaintiffs to "explain the factual basis for their claims". However, as noted above,  
 25 Plaintiffs' claims are statutorily based, and should largely be resolved by the Court as a  
 matter of law. Nonetheless, as part of their First Supplemental Responses to  
 Defendants' discovery Plaintiffs have provided copies of 2,000 of the subject emails  
 analyzed, with sections of the emails they deem to be violations clearly identified, and in  
 the case of subject lines, highlighted. Also provided was a "Legend" explaining the

1 analysis and the notations within the analyzed emails. The Declaration of James S.  
2 Gordon, Jr. submitted herewith contains an explanation of how the analysis and the  
3 legend explaining it is created.

4 Defendants ask this Court to compel Plaintiffs to explain "why a subject line is  
5 misleading" and "how they were misled" by a particular subject line. The "theory"  
6 Defendants demand of Plaintiffs is inherent in the language of the statute itself. How  
7 does one explain "how" or "why" subject lines such as the following are misleading  
8 and/or deceptive?: "Please call in asap"; "20k in 90 days - take my challenge"; "Are they  
9 going to choose you?"; "Are you looking for something better out of life?"; "Attention  
10 Moms"; "Do you feel trapped?"; "Good as gold It's time you were treated like someone  
11 important"; "Knock knock"; "Just what you're looking for – understanding".

12 Defendants either misunderstand, or misstate the law in this regard. Defendants  
13 have not cited, nor is there a requirement under either the Federal Can-Spam Act, or  
14 the Washington CEMA that an aggrieved party be "misled" in fact. It is sufficient to  
15 sustain a violation in that regard by merely showing that a subject line had the "capacity"  
16 to mislead. As the Washington Attorney General's office website states: *Generally, a*  
17 *subject line is considered legally deceptive if it has a tendency or capacity to deceive*  
18 *consumers. It need not actually deceive or harm consumers and there need not be*  
19 *intent to deceive."* (See Gordon Declaration attaching a page from the Washington  
20 Attorney General's website entitled "Junk Email"). To require anything more would  
21 effectively eviscerate the statutes by making proof of violations (in the case of internet  
22 service providers often numbering in the tens of thousands) virtually impossible. For  
23 instance, would a company such as Microsoft, AOL or Yahoo have to set forth a  
24 detailed theory about every one of millions of spams their servers received from a  
25 particular spammer whom they were suing? Would the Court require such a plaintiff to  
explain how each end-user recipient was actually deceived in fact by each and every

1 subject line? Plaintiffs contend that the unwieldy administration of such a trial would  
2 effectively preclude the bringing of claims by ISPs, the primary group sought to be  
3 protected by the Can-Spam Act, and one of the intended beneficiaries under the CEMA,  
4 i.e., statutory damages are doubled for each email received by an "interactive computer  
5 service", or ISP. Thus, it should be sufficient to present this evidence in a summary  
6 fashion, citing to representative examples of particular violations as Plaintiffs have done.

7 The statutes were created to protect the public from deceptive and misleading  
8 commercial email by regulating the conduct of commercial emailers. To accomplish  
9 that end both the Washington legislature and Congress created statutes which are  
10 wholly prohibitive. That is, the statutes focus upon prohibiting certain conduct on the  
11 part of commercial email marketers, but place no burden of any affirmative action upon  
12 recipients of commercial emails.

13 To require that Plaintiffs provide anything further than their allegations that each  
14 email contains statutory violations of particular provisions of the applicable statutes, and  
15 to specifically identify those violations, as Plaintiffs have done, would require Plaintiffs to  
16 make legal conclusions, share their attorney work-product, and provide their trial  
17 preparation, all improper subjects to compel. The Court should deny Defendants'  
18 Motion.

## 19 **2. Allegations Under RCW 19.170 The Deceptive Offers Statute.**

20 Although Defendants apparently rely for their ostensible "opt-in" defense upon  
21 emails sent by one of their marketing "affiliates" known as EmailPrize.com, which did  
22 send initial emails to Plaintiffs, and which sought to unlawfully obtain personal  
23 information from recipients such as Plaintiffs, Plaintiffs have already indicated and here  
24 reiterate that they intend to voluntarily dismiss these allegations from the lawsuit.



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2           **3. Information RE Plaintiffs' Attempts To "opt-out".** In response to  
3 Interrogatory No. 10. Plaintiffs reminded Defendants that they are in possession of  
4 documents indicating Plaintiffs' attempts to "opt-out". Attached to the Gordon  
5 Declaration submitted herewith are documents actually provided by Defendants as part  
6 of their discovery responses, which bear on this issue. Plaintiffs also have previously  
7 provided Defendants in prior productions with copies of their "Autoresponder" cease and  
8 desist messages, as well as other emails sent to Defendants' "Reply to" email  
9 addresses, all of which constitute attempts to "opt-out". Additional copies of these are  
10 also attached to the Gordon Declaration.

11           The Court is urged to take note of Mr. Gordon's discussion of the "opt-in" "opt-  
12 out" scam. Because, although spammers such as Defendants often pose a consumer's  
13 ostensible "opt-in" as a defense, somehow justifying their sending of unlawful spam  
14 email, as poignantly described by Mr. Gordon, it is nothing more than a scam.  
15 Moreover, Mr. Gordon is fully prepared to show that thousands of unlawful emails were  
16 sent to his domain subsequent to his numerous attempts to "opt-out", and therefore in  
17 direct violation of the Can-Spam Act. His Declaration attaches much of that evidence,  
18 which has already either been provided to Defendants, or by Defendants.

19           **4. Emails Seeking Personally Identifying Information.** In response  
20 to Defendants' Interrogatory No. 17 Plaintiffs responded "All emails sent by Defendants  
21 on behalf of First Premier Bank, all of which are contained in the previously provided  
22 discovery responses." Defendants themselves sent these emails. Plaintiffs produced  
23 them back to Defendants in 3 different document productions now. All Defendants need  
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1 to do is look at their own emails sent on behalf of First Premier Bank to understand  
2 Plaintiffs' response here.

3 **5. Information Re Plaintiffs' "AutoResponder" Program.**

4 Defendants complain that Plaintiffs are being evasive in their responses to  
5 Requests For Production No.s 2 and 3, and Interrogatory No. 6 requesting information  
6 related to Plaintiffs' Autoresponder program. However, the Gordon Declaration makes  
7 the situation clear. There simply are no documents, or programs about which Mr.  
8 Gordon has knowledge, or which he possesses. The Autoresponder mechanism he  
9 used was web-based, and provided by his internet service provider. There were no  
10 "contracts" related to its use. Whether Defendants are satisfied or not, there is nothing  
11 "evasive" about the truth.

12 **6. There Has Been No Adverse Admission By Plaintiffs.** Contrary to  
13 Defendants assertions and mischaracterizations, Plaintiffs have not "admitted" that two  
14 thirds of the Emails were "superfluous", or "irrelevant". In fact, as the Declarations of  
15 James S. Gordon, Jr. submitted in support of this response and in response to  
16 Defendants' Motion To Compel Segregation Of Emails, incorporated herein by this  
17 reference, attest, that as a small one-man interactive computer service business, the  
18 task of managing the flow of spam emails from offenders such as Defendants is  
19 onerous, yet, he has done his best to identify, collect and sort the massive volume of  
20 these spam emails. To the extent that Plaintiffs' business records at any particular time  
21 may include duplicates of Defendants emails, that is certainly no "admission" of  
22 anything other than the complexity and magnitude of the task at hand, which it should  
23 be noted took Defendants' hiring a large team to undertake a "comprehensive review".  
24 Again, for Defendants to complain about the "disorganized" form in which their own

1 emails are produced back to them is highly ironic. To characterize Mr. Gordon's  
2 explanation and expression of humility to this Court as some kind of "admission"  
3 contrary to his interests is specious at best.

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5 **RESPECTFULLY SUBMITTED** this 2nd day of January, 2007.

6 **MERKLE SIEGEL & FRIEDRICHSEN, P.C.**

7  
8 /s/ Robert J. Siegel  
9 Robert J. Siegel, WSBA #17312  
10 Attorneys for Plaintiffs  
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PLAINTIFF'S RESPONSE IN OPPOSITION TO  
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Certificate of Service

I, hereby, certify that on January 2, 2002, I filed this document with this Court via approved electronic filing, and served the following:  
Attorneys for Defendants: Newman & Newman, Derek Newman

  
Adana Lloyd